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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1752

PHILLIP R. HILLIARD,
Petitioner

vs.

ARMCO STEEL CORPORATION, A Corporation,
and THE BUTLER ARMCO INDEPENDENT UNION,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, Phillip R. Hilliard, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit entered March 10, 1976, upholding a decision of the United States District Court for the Western District of Pennsylvania. (1a) The decision of the District Court denied petitioner's claim for relief against the Butler Armco Independent Union, (called "union" below) for failure to represent him properly, and for breach of contract against Armco Steel Corporation (called "company" below) for failing to provide petitioner with an unpaid sick leave due to alcoholism.

OPINIONS BELOW

The following opinions are printed in the appendix to this petition:

1. Opinion per curiam and dissenting opinion issued by the United States Court of Appeals for the Third Circuit, March 10, 1976. (1a)

2. An order of the United States Court of Appeals dated April 15, 1976 denying a petition for a rehearing filed by petitioner herein. (13a)

3. Opinion and order of the District Court for the Western District of Pennsylvania dated June 5, 1975 entering judgment in favor of respondents. (14a)

JURISDICTION

The opinion and judgment of the Court of Appeals were issued on March 10, 1976. This petition for certiorari is filed within ninety (90) days therefrom. The jurisdiction of this court is invoked under 28 U.S.C.A. §1254 (1).

QUESTIONS PRESENTED

1. Did union breach its duty of fair representation to petitioner, when it refused to arbitrate petitioner's right to a medical or sick leave of absence, when it knew that plaintiff suffered from the disease of alcoholism, and failed to believe the illness had been arrested prior to union's decision to refuse to process the grievance to arbitration?

2. Is company liable for a breach of a collective bargaining agreement when it failed to provide petitioner with a leave of absence due to sickness (alcoholism), and it knew plaintiff was suffering from the illness?

3. May respondents introduce extrinsic evidence to alter or explain the intent of the sick leave of absence provisions of the collective bargaining agreement?

STATUTORY PROVISION INVOLVED

The statutory provision involved is section 301 of the Labor Management Relations Act, June 23, 1947, C. 120; 61 Stat. 156, 29 U.S.C.A. §185, which provided:

> "SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.
>
> (c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.
>
> (d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

STATEMENT OF THE CASE

This action was commenced under Section 301 of the Labor Management Relations Act, 29 U.S.C.A. §185, alleging that respondent union breached its duty of fair representation, and defendant company breached a duty owed petitioner arising out of a collective bargaining agreement, when respondent company discharged petitioner in June of 1969. Company refused to reemploy or reinstate him after it was clear he was suffering from alcoholism, refused to grant a medical leave of absence as provided by the collective bargaining agreement, and respondent union failed to carry petitioner's grievance to arbitration.

Respondent union is the collective bargaining agent for employees employed by respondent company at its Butler, Pennsylvania works. Article VIII, Section M (Leaves of Absence) at paragraph 3 of the operative collective bargaining agreement between union and company in effect at the time of discharge, provided the following:

> "Any employee who is known to be ill or disabled, whose illness or disability is supported by evidence satisfactory to the Plant Physician, will be granted sick leave automatically for the period of such illness or disability not to exceed the limitations set out in paragraph (2) (a) of Section L of this article." (4a)

Respondent company was aware that the petitioner had freely indicated his problem with alcoholism (16a), but it decided, in the light of petitioner's earlier problems with alcohol, that he should be discharged. A grievance was filed

disputing company's action. During the processing of the grievance through the grievance procedure petitioner voluntarily admitted himself to Chit-Chat Farms for an alcoholic rehabilitation program (20a). Prior to the final step in the grievance procedure, Chit-Chat Farms' clinical psychologist informed company and union that Hilliard was in fact an alcoholic, and his prognosis was "fair to good" (3a).

Union, after being informed of Chit-Chat's prognosis, failed to take his case to arbitration (4a).

Petitioner's case, simply put, is that he was entitled to receive the benefits of Article VIII, Section M, Paragraph 3, in that his illness had been clearly indicated to respondent company, and that he was entitled to an unpaid sick leave of absence.

At the trial, petitioner called Doctor William J. Browne, a qualified psychiatrist, who testified that alcoholism is an illness or a disease. Respondents offered no expert testimony whatsoever to rebut Dr. Browne (6-7a).

The District Court, over objection, admitted testimony (a) that it was common knowledge throughout the plant that Hilliard was again drinking heavily, even though that evidence was hearsay; and (b) that respondent union and company did not understand the terms of Article VIII, Section M, Paragraph 3, to include employees addicted to alcohol (23a). The District Court stated:

> "In negotiating and implementing the contract, the testimony indicates that neither the company nor the Union, who were the only parties to the contract, ever intended or understood §M to apply to employees addicted to alcohol and the clause has never been applied to such employees. Both the Union and management negotiators testified that this clause was never intended to apply to alcoholics and had never been applied to them. Other alcoholics had been

discharged and this provision was not applied. Further evidence that this section was not thought to apply to alcoholics is the fact that in 1971 the Union sought during negotiations to obtain a provision in the contract for leave of absence for alcoholics."[1]

Absent testimony that alcoholism was not meant to be covered by Article VIII, Section M, Paragraph 3, the District Court had before it the following testimony:

(a) alcoholism is a disease;

(b) petitioner belongs to a class of persons who are addicted to alcohol and is an alcoholic;

(c) petitioner was not granted an unpaid sickness leave of absence, but discharged;

(d) respondent union and company knew petitioner suffered from alcoholism, was attempting to rehabilitate himself, and had not drunk intoxicants since his discharge by company;

(e) his prognosis for recovery was "fair to good".

The majority panel of the Court of Appeals found no problem with the consideration by the District Court of the testimony of respondents concerning various negotiations between them during the years. It also stated (5a) that the District Court found that Article VIII Section M was never intended to apply to alcoholics.

It (3a) accepted as fact that petitioner was "still drinking".

Absent those two pieces of evidence, nothing would stand in the way of petitioner's request for an unpaid sick leave of absence.

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[1]Petitioner was discharged in 1969 (3a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court.

In *Vaca vs. Sipes*, 386 U.S. 171, 17 L.E.2nd 842, 87 S.Ct. 903 (1967), this Court made clear the principle that a collective bargaining agent has a duty fairly to represent all of its members. It also stated the employer may be liable in such an action because of its breach of the collective bargaining agreement.

In such a case, the employer and the union, being charged by an employee that the company breached its collective bargaining agreement, and the union failed to represent the employee in remedying such breach, cannot be permitted to introduce extrinsic evidence regarding the intent of unambiguous contract language.

The use of parol evidence to amend the clause involved herein to exclude alcoholism as a sickness simply opens the gate for respondents to deny relief. (See *Association of Westinghouse Salaried Employees vs. Westinghouse Corporation*, 283 F.2d 93 (C.A. 3) (1960) and *Local 13, International Federation of Professional and Technical Engineers, AFL-CIO vs. General Electric Company*, ___ F.2d ___ (1976) (C.A. 3), No. 75-1887 (filed February 18, 1976).

Additionally, a further question is raised by this case concerning the extent of the union's duty when it is provided with information and then ignores such information in coming to its decision. The District Court and the Court of Appeals seem to read *Vaca, supra*. and cases such as *Bazarte vs. United Transportation Union*, 429 F.2d 868 (C.A. 3, 1970) and *DeArroyo vs. Trabajadores Packing*, 425 F.2d 281 (C.A. 1, 1970) to permit a union to ignore such information, and be free from any judicial challenge from an injured

member. While there may be cases which do not place liability for unfair representation based upon mere negligence, *Teamsters Local 962 and Great Western Uni-Freight System*, 209 N.L.R.B. 52, 85 L.R.R.M. 1385 (1974), that case and similar cases can hardly be said to apply here where positive information was supplied to the union and the company and it was ignored by both parties.

Finally, there is a clear disagreement among the various Courts of Appeal about the extent of the union's duty to a grievant seeking arbitration of a right. See and compare *Ruzicka vs. General Motors Corporation*, 523 F.2d 306 (C.A. 6, 1975) where an inexplicable failure to appeal a grievance in a timely fashion was held to be actionable by the injured grievant, and *Cannon vs. Consolidated Freightways Corp.*, 524 F.2d 290 (C.A. 7, 1975), where that court felt the union's activity had to be intentional and directed at a member personally in order to be liable for breach of the duty of fair representation. Additionally, the court in *Cannon, supra.* cited *Motor Coach Employees vs. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), for authority, even though that case is clearly distinguishable from the kind of fair representation issues involved in *Cannon, supra.*

While the line between arbitrary conduct and mere mistake will never be absolutely clear, it appears important for this Court to determine whether positive disregard of information received may be contenanced. In the case at hand, respondent union was made aware of petitioner's medical condition, but refused to act upon the information received. The same information was supplied to respondent company. In the face of this evidence, both parties refused to apply the provisions of the collective bargaining agreement to petitioner. It is submitted that such actions by respondents are violations of the respective duties owed petitioner.

CONCLUSION

For the reasons stated above, Phillip R. Hilliard, prays this Honorable Court to grant this Petition for a Writ of Certiorari to review the issues raised herein.

Respectfully submitted,

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APPENDIX TO A WRIT OF CERTIORARI
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Not for Publication

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 75-1829

PHILLIP R. HILLIARD,
Appellant

v.

ARMCO STEEL CORPORATION, a Corporation,
and THE BUTLER ARMCO INDEPENDENT UNION,
Appellees

(D.C. Civil Action No. 71-852)

Appeal from an Order of the United States
District Court for the Western District
of Pennsylvania

Argued: January 20, 1976
Before: BIGGS, HUNTER, and GARTH,
Circuit Judges

OPINION OF THE COURT

(Filed March 10, 1976)

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PER CURIAM

Plaintiff, Hilliard, an employee of Armco Steel Corporation (Armco) was discharged in 1969 for absence from work due to alcoholism. In 1971 he brought an action under §301 of the Labor Management Relations Act against Armco and the Butler Armco Independent Union (Union) claiming that the Union breached its duty to fairly represent him and that Armco breached the terms of its collective bargaining agreement by discharging him. The district court entered judgment for the Union and Armco, holding that Hilliard failed to prove that the Union breached its duty of fair representation and that he had also failed to prove that his discharge was without just cause. We affirm.

I.

The relevant facts and findings are set out in detail in the district court's opinion. ____ F. Supp. ____ (W.D. Pa. Civ. No. 71-852, June 5, 1975). Summarized they reveal the following.

Hilliard had been employed by Armco primarily as a slitting machine operator from June 1949 to June 1969. Hilliard was an alcoholic. He sought medical help in 1960, 1967 and 1968. In 1968 he was suspended for seven days for reporting to work with a heavy hangover. In 1965 he was suspended for sixty days after the Union had succeeded in converting his discharge for alcoholism to a suspension. This latter suspension was subject, among other conditions, to his continued participation as a member of Alcoholics' Anonymous and his maintaining satisfactory work and attendance records.

Hilliard, however, did not abstain from drinking nor did he comply with the specified conditions. On June 17, 18 and 19, 1969, Hilliard could not report to work as a result of his excessive drinking. Displeased with Hilliard's performance, Armco decided to suspend him for five days subject to discharge.

The Union filed a grievance and proceeded through a Step IV hearing. Just prior to the Step IV hearing Hilliard voluntarily entered Chit Chat Farms, a private institution for the treatment of alcoholics. At the conclusion of Hilliard's stay, Chit Chat Farm's clinical psychologist wrote Armco informing them that Hilliard had made good progress and that his prognosis was "fair to good."

The Union relied upon the report from Chit Chat Farms at the Step IV hearing in urging Armco to reinstate Hilliard. It did so even though advised that Hilliard was still drinking. Armco was not persuaded and affirmed its decision to discharge Hilliard. Thereafter the Union's grievance commit-

tee unanimously determined that Hilliard's grievance should not proceed to Step V Arbitration concluding that Hilliard's discharge was for good cause. When this decision was announced at the Union meeting, neither Hilliard nor any other Union member objected.

It was not until months afterwards that Hilliard brought this action.

II.

Hilliard's primary contention is that his alcoholism constituted an illness within the meaning of Article VIII, §M of the collective bargaining agreement as a consequence of which he contends that he should not have been discharged but was rather entitled to a leave of absence.

Article VIII, §M provides:

Article VIII, Section M, Paragraph 3:

> "Any employee who is known to be ill or disabled, whose illness or disability is supported by evidence satisfactory to the plant physician, will be granted sick leave automatically for the purpose of such illness for the period of such illness or disability not to exceed the limitations set out in Paragraph (2a.) of Section L of this Article."

The district court in analyzing the evidence and applying it to the appropriate legal standard found in *Vaca v. Sipes*, 386 U.S. 171 (1967),[1] held that Hilliard had failed to prove that the Union breached its duty of fair representation and that he had failed to prove that his discharge was without just cause.

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[1]For an employee to prevail in an action against his Union and employer where it is alleged that the Union has refused to prosecute the employee's discharge grievance to arbitration, the plaintiff must show that Union, as bargaining agent, breached its duty of fair representation.

In concluding that the plaintiff had failed to carry his burden, the district court considered the various negotiations which had taken place through the years between the Union and Armco and found that Article VIII, §M was never intended to apply to alcoholics nor had it ever been applied to alcoholics. In addition to other evidence the district court considered the testimony of Hilliard's expert and Hilliard's employment history, a portion of which we have summarized.

We agree with the district court that the Union acted properly and in good faith. That conclusion, predicated on unassailable findings of fact made by the district court, precludes the plaintiff from the relief which he has sought against the Union and Armco.

We will affirm the June 5, 1975 Order of the district court which directed judgment in favor of the defendants and against Hilliard. The appellant will bear the costs of appeal.

To THE CLERK:

Please file the foregoing opinion.

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Circuit Judge

Hilliard v. Armco, No. 75-1829

BIGGS, *Circuit Judge*, dissenting.

Armco Steel Corporation (Armco) and The Butler Armco Independent Union (Union), defendants-appellees arrived at the conclusion on or about September 30, 1969, if not before, that alcoholism[1] was not an "illness" and, therefore, not within the purview of the sick leave provision of the collective bargaining agreement entered into between the Company and the Union on January 13, 1969. Article VIII, "Seniority", §M3. (Text *supra*.)

On June 25, 1969, the Company, asserting that alcoholism was not an illness, had discharged Hilliard, due to his repeated absences and neglect of work, despite his awareness of his difficulty and his eagerness to be cured.[2] The Union made use of the procedure prescribed by the collective bargaining agreement through Step IV, but abandoned Hilliard, deciding not to pursue arbitration. The appellees contend that Hilliard acquiesced in this abandonment, but, if he did so acquiesce, the acquiescence was indeed limited, for he brought the suit at bar on September 8, 1971, well within the statute of limitations.[3]

The appellant called Dr. William J. Browne, a qualified psychiatrist, who testified that alcoholism is an illness or a

[1]It cannot be denied that Hilliard's alcoholism was chronic. His alcoholic condition had gone on for a long time, certainly as far back as the latter part of 1963. *See* Joint Exhibit II-A.

[2]On May 12, 1965, Hilliard received disciplinary suspension. This was reviewed by the supervisor of labor relations of the Butler Works. *See* Defendants' Exhibit 1. After a stay at a rehabilitation center called Chit-Chat Farms, Hilliard showed some signs of recovery and in June, 1972, recontacted Armco in respect to steps to regain his employment. *See* Joint Exhibit H.

[3]The Pennsylvania statute of limitations is six years. 12 P.S. §31. Auto Workers v. Hoosier Corp., 383 U.S. 696, 701-04 (1966); Falsetti v. Local Union No. 2026, 355 F.2d 658, 659 (3d Cir. 1966).

disease. The defendants offered no expert testimony whatsoever to rebut Dr. Browne.

It is said by the appellees that at the time of the execution of the agreement of January 13, 1969, Armco and the Union did not consider alcoholism to be an illness or a disease.[4] This Court took the position as early as its decision in *Ass'n. of Westinghouse Sal. Emp. v. Westinghouse Corp.*, 283 F.2d 93 (1960), and as late as its decision in *Local 13, International Federation of Professional and Technical Engineers, AFL-CIO v. General Electric Company*, No. 75-1887 (Filed February 18, 1976), that extrinsic evidence could not be employed to alter or explain the intent of the parties in a collective bargaining agreement lacking ambiguity. See *Lo al 13*, n.13. Therefore, the history, relied upon by the majority, which resulted in the 1969 agreement, cannot be deemed admissible as evidence to prove the intent of the parties. Nor is the evidence of the parties' treatment of the alcoholism issue after Hilliard's dismissal of use in construing the 1969 contract.

Objectively contemplating the 1969 Agreement, the parties knew, or should have known, by January 13, 1969,

[4]Mike Michaels, who served as the general union chairman from 1962 to 1970, when asked by counsel for Armco whether alcoholism should be included as an illness, particularly with respect to the 1969 agreement, answered: "Well, [in] '69, the last negotiations at which I was the negotiator, not once was alcoholism mentioned as an illness to be paid for through sick benefits by the company. *We never even give* [*sic*] *it a thought*." (emphasis added.) Tr. 103.

It is clear that any discussion of alcoholism took place after Hilliard's discharge. *See* Tr. 215-18.

Against the background of the case at bar there seems to be no difference between the words "illness" and "disease". *Webster's New Int. Dict.*, 3 ed., gives the following definitions: "Illness: State of being ill or sick, *disease*, ailment, malady, disorder of health, sickness; as, a short or a severe illness. Disease: A condition in which bodily health is seriously attacked, deranged, or impaired; sickness, *illness*; as, mortality from disease." (Emphasis supplied.)

that the consensus of medical opinion was that the unambiguous meaning of the word "illness" encompassed "alcoholism." I cannot accept the conclusion that the parties did not have, or could not have had, the benefit of this medical consensus.[5] For example, the Congress of the United States, a body generally acknowledged to be one which does not act precipitously, passed an Act on August 4, 1947, entitled "Rehabilitation of Alcoholics," 61 Stat. 744, c. 472.[6] See also the United States Court of Appeals for the District of Columbia Circuit's opinion in *Easter v. District of Columbia*, 361 F.2d 50, 51-2, 56-60 (1966)[7] (*en banc*); *Driver v. Hinnant*, 356 F.2d 761, 763-64 (4th Cir. 1966).

The writer is familiar, of course, with the opinion of the Supreme Court in *Vaca v. Sipes*, 386 U.S. 171 (1967), and the

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[5]Article VIII, §M3, *supra*, indicates that there was available a plant physician.

[6]D. C. Code §§24-501 *et seq.*

The statute cited is applicable only to certain criminal proceedings in the District of Columbia. It is cited here to show in 1947 that twenty-two years prior to the 1969 collective bargaining agreement, alcoholism had been generally treated as a disease. The Act provides: "The term 'chronic alcoholic' means any person who chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages, or while under the influence of alcohol endangers the public morals, health, safety, or welfare. D.C. Code §24-502 (1961 ed.)."

The Act provides in general that a chronic alcoholic may not be punished as a criminal.

[7]As pointed out in *Easter*, the National Council on Alcoholism in 1965 defined a "chronic alcoholic" as a

> " ' " person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern.[1]

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[1]Public Health Service Publication, No. 730, "Alcoholism", prepared by the National Institute of Mental Health, National Institute of Health, U.S. Department of Health, Education and Welfare (1965). " ' " 361 F.2d at 53. Hilliard's disease clearly meets this definition.

decision of this Court in *Bazarte v. United Transportation Union*, 429 F.2d 868 (1970). But see *De Arroyo v. Trabajadores Packing., AFL-CIO*, 425 F.2d 281 (1st Cir. 1970) (Coffin, J.). *Vaca* established the principle that a union had a statutory duty fairly to represent all of its members. The writer is also aware of the principle announced by *Vaca*, and relied on so heavily by the appellees, that, if a union acts in good faith, under exclusive grievance procedures, the employee cannot carry his contract claim to federal district court. It is also clear that a union's breach of its duty of fair representation is to be treated as an unfair labor practice. 386 U.S. at 185.

Mr. Justice White for the Court in *Vaca*, stated:

> "We think that another situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, *and* if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance. It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefits were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances would, in our opinion, be a great injustice. We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive

injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements. Cf. *Richardson v. Texas & N.O.R. Co.*, 242 F.2d 230, 235-236 (C.A. 5th Cir.)

"For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." 386 U.S. at 185-86 (Note omitted; emphasis in the original.)

I find that the Union's conduct in not pushing to arbitration was arbitrary under the standard of this Circuit, as well as that of the First Circuit. *Bazarte, supra*, 429 F.2d at 872; *DeArroyo, supra*, 425 F.2d at 284. As Judge Coffin has noted, in the latter case, "We can rule out any possibility of subjective bad faith, hostility, discrimination, or dishonesty on the part of the Union officials.... However, we are still left with the Court's recognition that arbitrary and perfunctory handling by a union of an apparently meritorious grievance is not acceptable under the standard of fair representation."

One may suspect that one of the reasons why Armco and the Union rejected alcoholism as an illness is the extremely annoying circumstances which accompany such an illness: the broken promises of the alcoholic, his unkept engagements, his insensitivity to attendant circumstances and to fellow workers, the dangers inherent in having a person under the "influence" at work in a factory, particularly where the Company is engaged in the manufac-

ture of steel, and his deceptive maneuvers and inconsistencies of behavior generally.[8]

These considerations should be of little weight in evaluating what the contract covered and whether the Union secured the benefit of that coverage for Hilliard. Nor should we be impressed by the lack of contemplation by the parties of alcoholism as an illness at the time of agreement, even if we could consider this extrinsic evidence.[9] Suppose, for example, the disease in this case had been African Tick Fever, Asiatic Cholera, Fibrinogen 'Leuven,' a newly named genetic variant, or Cryofibrinogenaemia, a newly discovered disorder.[10] Would the appellee assert that the first

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[8]*See* Paredes, *Denial, Deceptive Maneuvers, and Consistency in the Behavior of Alcoholics*, 233 ANNALS N.Y. ACAD. OF SC. 23-33 (1974).

Goldfarb, *Time Perception in Alcoholics and Other Psychiatric Patients*, 125 J. OF GENETIC PSYCHOLOGY, Pt. 2, 315-18 (1974).

Skinner, Jackson Hoffman, *Alcoholic Personality Types: Identification and Correlates*, 83 J. OF ABNORMAL PSYCHOLOGY, No. 6, 658-66.

Donovan, Hague and O'Leary, *Perceptual Differentiation and Defense Mechanisms in Alcoholics*, 31 J. OF CLIN. PSYCHOLOGY, Pt. 2, 356-59 (1975).

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Shaw, MacSweeney, Johnson and Merry, *Personality Characteristics of Alcoholic and Depressed Patients*, 126 BRIT. J. OF PSYCHIATRY 56-59 (1975).

Twerski, *Alcologia: A "Logical" Paralogia*, 34 AM. J. OF PSYCHOANALYSIS 257-61 (1974).

See also, Chaffee, Blaine and Hill, FRONTIERS OF ALCOHOLISM (1970).

[9]*See* note 4, *supra*, and text accompanying.

[10]*See* letter from A. D. Berton, Medical Document. Serv., to Hon. John Biggs, Jr., February 12, 1976; Verhaeghe, et al., Fibrinogen 'Leuven', *Another Genetic Variant*, 26 BRIT. J. HAEMATOLOGY 421 (1974); Rosenberg, et al., *A New Haemorrhagic Disorder with Defective Fibrin Stabilization and Cryofibrinogenaemia, id.* at 269.

two named diseases were not included in the contract because they were foreign and unknown in the continental United States? Or that the latter two were excluded because they were newly named or discovered? I believe that such assertions by the appellees would be as reasonable as that of their present position with respect to alcoholism.

I conclude that Hilliard is entitled to pursue his remedy in the United States District Court. The appellees' position seems to me like Orwellian "New Speak" or perhaps the conversation between Alice and Humpty Dumpty.[11]

For the reasons stated, I must respectfully dissent.

I would reverse the judgment and hold that Hilliard is entitled to the benefits set forth in Article VIII, §M3.

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[11] "When I use the word," Humpty Dumpty said, in rather a scornful tone, "It means just what I want it to mean, neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master, that's all." *Alice Through the Looking Glass*, Chapter 6.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 75-1829

PHILLIP R. HILLIARD,
Appellant

v.

ARMCO STEEL CORPORATION, a Corporation,
and THE BUTLER ARMCO INDEPENDENT UNION,
Appellees

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and BIGGS,
VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN,
HUNTER, WEIS and GARTH,
Circuit Judges.

The petition for rehearing filed by

PHILLIP R. HILLIARD, *Appellant*,

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

.....
Judge

Dated: April 15, 1976

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PHILLIP R. HILLIARD,
Plaintiff

v.

ARMCO STEEL CORPORATION, a corporation, and THE BUTLER ARMCO INDEPENDENT UNION,
Defendants

Civil Action No. 71-852

OPINION

SCALERA, *J.*

I

The plaintiff, Phillip R. Hilliard, filed this action based on §301 of the Labor-Management Relations Act of 1947, 29 U.S.C. §185, et seq., as amended, which named Armco Steel Corporation and the Butler Armco Independent Union as defendants. The gravamen of the complaint is that the Union failed to take Hilliard's discharge to arbitration, thus allowing Armco to improperly discharge him in violation of the collective bargaining agreement.

Both defendants filed motions for summary judgment, which motions were denied.

Trial was held and the parties presented requested findings of fact, conclusions of law and trial memoranda.

II

Hilliard was discharged in 1969 from his job at the Armco plant in Butler, Pennsylvania. Hilliard was a member of the Union which represents the production and maintenance employees at Armco's Butler plant. The

contract between Armco and the Union contained a grievance procedure which constituted "the sole recourse with respect to any claim by an employee of a violation of the Agreement by the Company." Article VI, §2 B 2.14; Article IX, §A.

Hilliard was an alcoholic. Hilliard's drinking was such that he sought outside medical help in early 1960, and in 1967 and 1968. Hilliard's alcoholic condition in 1969 was preceded by eight to ten years of heavy drinking. In 1963, he was suspended for seven days for coming to work with a heavy hangover. In 1965, he was suspended for sixty days for coming to work under the influence of alcohol. There were numerous instances of bad workmanship and absenteeism. Hilliard was frequently warned about his drinking.

On May 11, 1965, Hilliard was at work under the influence of alcohol. He was suspended for five days subject to discharge. On May 18, 1965, after a hearing, he was discharged. The reasons given were the numerous instances of reporting to work while under the influence of intoxicating liquors and other problems related to his drinking habits, including absenteeism and poor workmanship.

The Union processed Hilliard's 1965 discharge to an informal hearing, at which the discharge was affirmed. The Union carried the grievance to Step III, at which point the Union succeeded in having the discharge converted into a sixty-day suspension. At the Step III proceedings, Hilliard promised to do anything necessary to hold his job. Hilliard did not dispute the fact that he was intoxicated at work nor did he deny his record of drinking problems. He admitted he was an alcoholic. He claimed that his discharge made him realize he could not control his problem without help and that since his discharge in May 1965, he had not had a drink and was attending AA meetings in order to learn how to help himself.

The conversion of the discharge into a suspension was based on the following conditions, with the understanding that a violation of the conditions would result in immediate and final discharge:

1. The grievant is to abstain from the use of alcoholic beverages.
2. He is to continue to avail himself of the "AA" program.
3. He is to consult with the Plant Physician, at intervals determined by the Plant Physician, in order to assess the grievant's progress in controlling his problem.
4. The grievant must maintain satisfactory work and attendance records.

The Union told Hilliard that this was his last chance and that he must comply with the conditions or lose his job. Hilliard did not comply with the terms set forth for his continued employment. Hilliard stopped attending AA meetings in 1967 or 1968. The written reports of those who treated Hilliard in 1969 show:

a. Plaintiff "freely indicated that he had a rather long history of alcohol related problems"; he stated that "he had multiple absenteeism, frequent warnings in reference to his drinking."

b. He was "best described as a simple alcoholic with no particular psychopathology underlying the addiction. A history indicates a gradual decline into the addiction over a considerable period of time."

c. "Mr. Hilliard admits having an alcoholic problem . . . Mr. Hilliard has a long history of absenteeism. The record indicates that most of the incidents of absenteeism resulted from his problem of alcoholism."

On June 17, 18 and 19, 1969, without giving any prior notice, Hilliard did not report for work, although he was

scheduled to report for work from 7:00 a.m. to 3:00 p.m. On the afternoon of June 19, Hilliard called in and asked to be placed on vacation status. He testified that this request was made because he was in such a condition after a heavy drinking episode that he could not drive to work. Hilliard had developed a pattern of missing two days of work and then taking unscheduled vacation. For example, six months before the June 1969 episode, he was absent without notice on two days, December 17 and 18, 1968, and then called his supervisor on the 19th requesting a vacation for the week, which request was granted. The same basic procedure was used in August 1967, when he reported off sick for two days, then called in and converted it to a week's vacation.

Unreported absenteeism is under the contract cause for discharge. The Union agreement provides:

SECTION E — Absenteeism

1. In recognition of the difficulties imposed upon Management through failure of employees to comply with working schedules, an employee reporting late for, or absenting himself from, work without prior notice and without just cause may be subject to such disciplinary action as Management may determine.

Hilliard was an experienced slitter and operated a slitting machine. If he did not report, his machine was either shut down or the company had to summon another employee, which frequently involved paying other operators overtime or doubletime.

After the June 1969 absences, Hal Hamilton, Supervisor of Employee Administration, met with John Hess, Jerry McGrath, and Francis Raabe, who were Hilliard's superiors, to decide what to do with Hilliard. They reported that Hilliard again had a problem with alcoholism; that there was no improvement in his behavior; that Hilliard was absent from work often, and that the quality of his work was poor.

This management group decided to suspend Hilliard for five days subject to discharge.

The Union immediately instituted a grievance on Hilliard's behalf. At the first hearing in the grievance procedure, the discharge was affirmed. At the hearing, the management personnel present were McGrath, Raabe, and Hamilton. The record of this hearing states:

> During the hearing, the incidents leading to your suspension and discharge were thoroughly reviewed. You agreed that the facts as presented were correct.
>
> Your not reporting for work as scheduled on 16, 17 and 18 was clearly the result of your continued use of intoxicative beverages. You have had previous suspensions because your problem with alcohol had affected your work and attitude.
>
> Your superiors and the Works Physician have worked with you to help you overcome this problem. Unfortunately, all efforts to help you rehabilitate have been to no avail. You have broken specific written conditions that you agreed to abide by when you returned to work after your last suspension.
>
> We have no alternative but to discharge you.

The Union on Hilliard's behalf appealed the grievance to Step III. Another hearing was held on July 8, 1969, and the decision of July 14 states:

> This hearing was held to review the facts pertinent to the discharge of Phillip R. Hilliard.
>
> The facts leading to the suspension and subsequent discharge of Mr. Hilliard were not contested and showed an "inching away" from the terms specified for his continued employment in a previous grievance. This trend was culminated in a flagrant violation of rules that left the Company no alternative to instituting discharge procedure.

> In view of the history and facts of this case, it is the sincere belief of the Company that Mr. Hilliard must fact reality on his own to best deal with his problem.
>
> The history, facts, and concern for the involved individual mandate that this discharge is hereby sustained.

The Union took Hilliard's grievance to Step IV and another hearing was held on September 30, 1969. The decision of that hearing states:

> In this grievance, Mr. Hilliard seeks reinstatement with the Company following his discharge for absenteeism.
>
> There is no dispute concerning the facts leading to the suspension and subsequent discharge of the grievant. Further, Mr. Hilliard admits having an alcohol problem, but he — and the Union on his behalf — contend that he is now rehabilitated. It is on this basis that they seek reinstatement.
>
> Mr. Hilliard has a long history of absenteeism. The record indicates that most of the incidents of absences resulted from his problem of alcoholism. He was discharged in May, 1965 as a result of this problem, but was returned to work 60 days later on a "last chance" basis following his assurances that he recognized his problem and was taking positive corrective steps concerning it. However, the record reveals that upon return to wrok he had a gradual relapse into his old ways, culminating in his failure to report as scheduled on June 17, 1969.
>
> Clearly, Mr. Hilliard was discharged for just cause and after due consideration. Nevertheless, the request for reinstatement on the basis of asserted rehabilitation has been thoroughly considered. However, it is concluded after a searching review of all the circumstances of this case, that a decision to reinstate Mr. Hilliard is not warranted.

Grievance denied.

After the Step III denial of his grievance, Hilliard went to Chit-Chat Farms for its twenty-eight-day alcoholic program. Gerald Shulman, the clinical psychologist, advised the company that Hilliard was an alcoholic; had made good progress in identifying as an alcoholic; appears to be sincerely motivated for recovery, and that the overall prognosis "would be fair to good." Dr. Browne, plaintiff's expert, when asked about this twenty-eight-day program, testified, "In 28 days you're not going to cure anything," and that after such visits some people still continue to drink.

The Union, utilizing the Chit-Chat letter, argued at Step IV that Hilliard was rehabilitated and should be rehired. The Union made this plea even though it had been advised that Hilliard was still drinking. At all these hearings, Hilliard was present and agreed with the facts presented. Hilliard complimented the Union on the fine presentation made on his behalf in the hearings.

After three hearings and three refusals by three different levels of management to reinstate Hilliard, the Union then had the problem of determining whether to press the grievance to arbitration. The grievance committee met and considered all of the facts, including the 1965 grievance proceedings; Hilliard's admission that he was still drinking heavily; his absences from work; the repeated warnings that the Union officers had given him concerning drinking, as well as the fact that it was common knowledge throughout the plant that Hilliard was again drinking heavily.

The members of the committee unanimously agreed that Hilliard's discharge should not be taken to arbitration. The grievance committee of the Union consisted of seven members, three elected officers of the Union and four elected departmental representatives, who are appointed to the committee. For many years, these members had been

active in Union affairs and had been involved in various grievance proceedings. Each of them was fully aware of the seriousness of a discharge because it terminates an employee's job and his opportunity to receive a pension on retirement from Armco. In determining not to go to arbitration, the committee concluded that Hilliard's discharge was for good cause and that there was no violation of the contract.

The decision not to proceed to arbitration was communicated to Hilliard and also to the Union membership at the next Union meeting. No objection was made by anyone to this decision, including Hilliard. Each member of the grievance committee, in deciding not to submit the claim to arbitration, exercised his own independent judgment in a fair and unbiased manner. No member of the grievance committee had any hostility or personal grudge against Hilliard.

III

When, as in this case, a union refuses to prosecute a member's discharge grievance to final arbitration, the grievant may bring an action under §301 of the Labor-Management Relations Act joining both the union and the employer as defendants. Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). To prevail in such a suit, however, plaintiff must "show that the union, as bargaining agent, breached its duty of fair representation in its handling of the employee's grievance." Vaca v. Sipes, *supra*, at page 855. Otherwise, the entire cause of action as it runs against both defendants must fail. Vaca, *supra;* Hubicki v. ACF Industries, Inc., 484 F.2d 519 (3d Cir. 1973).

In Hubicki, *supra*, the plaintiff-employee first sued his former employer. The District Court granted the motion of the defendant for summary judgment. The Circuit Court in affirming noted at page 522:

> "Since Hubicki did not assert lack of fair representation on the part of his union and since he did not allege or show any attempt to use the contract grievance procedure, we believe that the district court properly concluded that plaintiff failed to state a cause of action upon which relief could be granted."

The plaintiff filed a second suit against his union alleging that the union had "arbitrarily, capriciously and without reasonable cause refused to employ the contract grievance machinery to protect his interests." Hubicki, *supra*, page 523. Plaintiff amended his complaint joining the former employer ACF as a defendant. The District Court granted the motion for summary judgment for the defendant company on the grounds of res judicata, and for the defendant union "on the ground that viewing all the evidence in the light most favorable to the plaintiff, there were no facts alleged to raise a triable issue of arbitrary, capricious or bad faith conduct on the part of the union." Hubicki, *supra*, page 525. The Circuit Court affirmed, citing Vaca, *supra*.

A breach of the union's statutory duty of fair representation can occur only when the union's official relationship with a member of the collective bargaining unit is "arbitrary, discriminatory, or in bad faith." Vaca, *supra*, page 857.

The actual propriety of the grievant's discharge is immaterial to the strength of a *Vaca*-type action; the real issue is whether or not the union acts in good faith when it determines that the discharge is proper within the meaning of the applicable collective bargaining agreement.

Thus, a discharged employee may not sue his former employer if a collective bargaining agreement is in effect which provides for a grievance procedure, except through the medium of an action under §301 of the Labor-Management Relations Act, and then only if he asserts and

proves lack of fair representation on the part of his union. This is so even if the grievance has merit.

IV

The thrust of Hilliard's argument is that his alcoholism was an illness within the meaning of Article VIII §M, for which he should have been given a leave of absence. If Hilliard's interpretation of Article VIII §M and the supporting contract provisions are correct, he argues that his discharge was improper.

Section M states in part that:

> "Any employee who is known to be ill or disabled, whose illness or disability is supported by evidence satisfactory to the Plant Physician, will be granted sick leave automatically for the period of such illness or disability. . . .

The evidence submitted at trial proves that (1) the Union did not negotiate the contract or understand its terms to excuse alcohol-related offenses against an employee's work responsibilities, and (2) the Union had aided Hilliard in the past but determined that in this instance arbitration could not save him from discharge.

In negotiating and implementing the contract, the testimony indicates that neither the company nor the Union, who were the only parties to the contract, ever intended or understood §M to apply to employees addicted to alcohol and the clause has never been applied to such employees. Both the Union and management negotiators testified that this clause was never intended to apply to alcoholics and had never been applied to them. Other alcoholics had been discharged and this provision was not applied. Further evidence that this section was not thought to apply to alcoholics is the fact that in 1971 the Union sought during negotiations to obtain a provision in the contract for a leave of absence for alcoholics.

Although in recent years alcoholism has been classified as a disease and even though this may be the more enlightened opinion, it is apparent that this view is not unanimous. Dr. Browne, plaintiff's expert on alcoholism, conceded that there are many physicians, psychiatrists and lay people who do not consider alcohol to be a disease. He testified:

> Q. And even today the American Medical Association although they are very tardy, there are still those doctors who argue and contend it is not a disease, are there not?
>
> A. Oh, yes.
>
> Q. And there's still psychiatrists today who argue and contend it is not a disease, do they not?
>
> A. That's right. They look upon it primarily as a symptom of other diseases.
>
> Q. And the debate as to whether it's a disease or not or whether it's merely a symptom of some other illness is still raging today?
>
> A. Among some psychiatrists. I don't number myself among them.
>
> • • •
>
> Q. Now, would you also agree that as you go down the level lower to people who are not in the medical or psychiatric field that there are still those who contend today that it is not a disease but is a weakness or a self-inflicted or is a criminal matter to be handled by criminal courts?
>
> A. Yes. There are quite a few who view it in that way.

Dr. Browne also testified that for a disorder to be called a disease, it must be so classified in the Diagnostic and Statistical Manual of Mental Disorders of the American

Psychiatric Association. This Manual defines alcoholism as a disease and sets forth three categories of alcoholism: (1) episodic excessive drinking (intoxication 4 times a year); (2) habitual excessive drinking (intoxication more than 12 times a year); and (3) alcohol addiction. Dr. Browne, incidentally, was of the opinion that only the third category was a disease, differing from the Manual and the view of other experts.

In evidence is the fact that prior to 1956, the American Medical Association did not classify alcoholism as a disease. The contract provision was in existence prior to 1956.

Also in evidence is a publication issued by the company in 1972 calling alcoholism a disease. This very publication, however, pointed out that the company still had the right to discharge alcoholics, thus reinforcing the evidence that neither the company nor Union viewed §M as being applicable to alcoholics.

V

The evidence does not support a finding of a breach of the Union's duty of fair representation. Indeed, the evidence indicates that the Union acted properly and in good faith. Thus, under the law, the plaintiff cannot recover from the Union or the company.

The evidence presented by plaintiff to the effect that alcoholism is a disease and that the plaintiff therefore should have been treated as an employee with an illness under that provision of the contract providing for leaves of absence in such cases does not support plaintiff's position. Even if this evidence did support plaintiff's position adequately, it is the law that proof that the Union acted negligently or exercised poor judgment, or perhaps was not aware of the proper and advanced attitude towards alcoholism would not support a claim of unfair representation. But aside from this proposi-

tion, the evidence merely indicated at its best that there is a substantial body of opinion which considers alcoholism to be a disease; that this may be the more enlightened viewpoint; and that employees who are alcoholics should be treated as persons with an illness.

The evidence submitted in this case concerning the proper classification of alcoholism only served to strengthen the inference that the Union acted in a fair and reasonable manner. We conclude that plaintiff has failed to prove that the Union breached its duty of fair representation and failed to prove that plaintiff's discharge was without just cause, and an appropriate order will be entered in favor of the defendants.

ORDER

SCALERA, J. June 5, 1975

It is ordered and directed that judgment be and hereby is entered in favor of the defendants, Armco Steel Corporation and The Butler Armco Independent Union, and against the plaintiff, Phillip R. Hilliard.

/s/ RALPH F. SCALERA
Ralph F. Scalera
United States District Judge

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